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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ANGEL PAIN VARGAS,
Petitioner,
vs.
A. H. BULL STEAMSHIP CO.,
Respondent.

FELIPE ALMESTICA,
Petitioner,
vs.
BALTIMORE INSULAR LINE, INC.,
Respondent.

JUAN ECHEVARRIA RODRIGUEZ,
Petitioner,
vs.
A. H. BULL STEAMSHIP CO.,
Respondent.

Civil Actions

On Consolidated Petition for Writ of Certiorari to the Supreme Court of New Jersey

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of Question Presented for Review

May a state court in New Jersey, the state of defendants' incorporation, dismiss, on the ground of *forum non conveniens*, actions brought under the Jones Act:

a) upon unchallenged findings that Puerto Rico is the more convenient forum, and that, other than being the defendants' corporate domicile, New Jersey has no connection whatever with the causes of action;

b) upon defendants' offer to submit to suit in Puerto Rico, the defendants not being amenable to personal service in that jurisdiction; and

c) upon condition that defendants so submit to suit in Puerto Rico?

Counter-Statement of the Case

Each of the three plaintiffs is a longshoreman residing in Puerto Rico, who sustained an accident while working as a longshoreman aboard a ship owned by one of the respective defendants. Each brought an action in the New Jersey Superior Court, Law Division, to recover damages for the resulting personal injuries. On seasonable motions by the respective defendants, the Law Division dismissed each action on the basis of *forum non conveniens*, whose opinion is reported at 44 N. J. Super. 536, 131 Atl. 2d 139. The judgment of dismissal was affirmed by the New Jersey Supreme Court for the reasons stated in the Law Division. The *per curiam* opinion by the New Jersey Supreme Court is reported at 25 N. J. 293, 135 Atl. 2d 857.

Petitioners do not challenge the findings of the Law Division that each accident occurred in Puerto Rico; that the petitioners and the witnesses reside in Puerto Rico;

that the applicable medical and employment records are located in Puerto Rico; that the language common to the plaintiffs and the witnesses is Spanish; that inconvenience and expense would result if the cases were tried in New Jersey; and that these cases had no place in the New Jersey courts except for the fact that the defendants are corporations in New Jersey (44 N. J. Super. at 551; 131 Atl. 2d at 48; R. 16a).

In moving to dismiss the complaints on the ground of *forum non conveniens*, each defendant pledged itself to appear voluntarily in any action which might be brought against it by the respective plaintiffs in the courts of Puerto Rico growing out of the accidents which are the subjects of these cases. The respective judgments, which are sought to be reviewed, granted dismissal on condition that the defendants do so. The judgments are set forth at pages 42a to 47a of the Appendix prepared for the Superior Court of New Jersey, Appellate Division.

ARGUMENT

POINT I

The state court does have power to dismiss a Jones Act suit under the doctrine of *forum non conveniens*.

This court has already made it clear that a state court is free to apply to a Jones Act suit its own doctrine of *forum non conveniens*, provided that such doctrine is non-discriminatory and in accord with the requirements of the Privileges and Immunities Clause.

This doctrine is to be applied in a Jones Act case in the same way as in an action brought under the Federal Employers Liability Act (45 U.S.C.A. Sections 51-60). It was so contended by the petitioners in the Superior Court of New Jersey; see 44 N. J. Super. 540; 131 Atl. 2d 41; (R. 3a). Respondents agree.

In *Second Employers' Liability Cases*, 223 U. S. 1 (1912), this court held that the duty on the part of a state court to hear an action brought under the Federal Employers' Liability Act did not involve any infringement by Congress of the state's power to regulate the jurisdiction of its courts or to control or affect their modes of procedure. Thus, VAN DEVANTER, *J.* said for the court at page 56:

> "• • • there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure."

Bainbridge v. *Merchants & Miners Co.*, 287 U. S. 278 (1932), was an action brought in the state court of Pennsylvania under the Jones Act. The state court dismissed the action on the ground that the word "district" as used in 46 U. S. C. §688, required the action to be brought in Maryland where the defendant's principal office was located. The Supreme Court reversed and held that the word "district" referred only to venue in the Federal courts and did not apply to a Jones Act suit brought in a state court. In this connection, SUTHERLAND, *J.* said for the court at page 280:

> "• • • If the question were more doubtful than we think it is, we should be slow to impute to Congress an intention, if it has the power, to interfere with the statutory provisions of the various states fixing the venue of their own courts. It follows that the venue should have been determined by the trial court in accordance with the law of the state."

The power of a state to determine what controversies shall be heard in its own courts was clearly laid down in *Chambers* v. *Baltimore & Ohio Railroad Co.*, 207 U. S. 142 (1907), wherein the court stated at page 148:

> "But, subject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The State policy decides whether and to what extent the State will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different States may have different policies and the same State may have different policies at different times. But any policy the State may choose to adopt must operate in the same way on its own citizens and those of other States. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and witheld from the citizens of other States is void, because in conflict with the supreme law of the land."

In *Douglas* v. *New Haven & Hartford Railroad Co.*, 279 U. S. 377 (1929), HOLMES, *J.* said for the court at 387:

> "As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United State is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse. Second Employers' Liability Cases, 223 U. S. 1, 56, 57."

That the state courts may decide whether or not to entertain an action brought under the Federal Employers' Liability Act, provided that the basis for such decision is non-discriminatory and consistent with the requirements of the Privileges and Immunities Clause, was reiterated in *McKnett* v. *St. Louis & San Francisco Railway Co.*, 292 U. S. 230 (1934), wherein BRANDEIS, *J.* said for the court at p. 233:

> "While Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers' Liability Act, *Douglas* v. *New York, N.H. & H.R. Co.*, 279 U. S. 377, 387, the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law. The denial of jurisdiction by the Alabama court is based solely upon the source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights arising under federal laws."

It is submitted that the last three cited cases completely refute the petitioners' contention that a state court has no power to apply the doctrine of *forum non conveniens* in a Jones Act suit.

Miles v. *Illinois Central Railroad Co.*, 315 U. S. 698 (1942); *Baltimore & Ohio Railroad Co.* v. *Kepner*, 314 U. S. 44 (1941); and *Pope* v. *Atlantic Coast Line Railroad Co.*, 345 U. S. 379 (1953) which are cited and relied upon by petitioners on page 5 of their petition herein, are distinguishable from the instant case so that the decision below is not in conflict with them. None of those cases involved the application by a state court of the doctrine of *forum non conveniens* to an action pending therein. Instead, in each of those cases, the state court was asked

to enjoin the prosecution of a Federal Employers' Liability suit in a different state or Federal court. There is an obvious distinction between the power of a court to determine what controversies it will hear, and the power of the court to determine what controversies the courts in another sovereign jurisdiction will hear.

In *Southern Railway Co.* v. *Mayfield*, 340 U. S. 1 (1950), this court expressly held that the *Kepner* and *Miles* cases did not deprive a state court of the power to apply *forum non conveniens* to suits brought under the Federal Employers' Liability Act. In that case, the U. S. Supreme Court had before it two cases in which the Supreme Court of Missouri had dismissed writs of mandamus to compel a state trial court to exercise discretionary jurisdiction in disposing of motions to dismiss F.E.L.A. suits on the ground of *forum non conveniens*. The U. S. Supreme Court held that the state court did possess such discretionary power and, therefore, vacated the judgments below and remanded the cases to the Supreme Court of Missouri. In so doing, the court expressly held that neither *Miles* nor *Kepner* prevented a state court from dismissing an F.E.L.A. suit under the doctrine of *forum non conveniens*. The opinion of the court, per FRANKFURTER, *J.* states at 340 U. S. 4:

> "* * * Giving the opinion of the Supreme Court of Missouri in these cases a scope most favorable to reliance on a non-federal ground, doubt still remains whether that Court did not deem itself bound to deny the motions for dismissal on the score of *forum non conveniens* by its view of the demands of our decisions in *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44, and *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698.
>
> "But neither of these cases limited the power of a State to deny access to its courts to persons seeking recovery under the Federal Employers' Liability Act

if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially, see *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges-and-Immunities Clause of the Constitution. No such restriction is imposed upon the States merely because the Employers' Liability Act empowers their courts to entertain suits arising under it. There was nothing in that Act even prior to §1404(a) of the 1948 revision of the Judicial Code, Title 28, U. S. C., which purported 'to force a duty' upon the State courts to entertain or retain Federal Employers' Liability litigation 'against an otherwise valid excuse.' *Douglas* v. *New York, N. H. & H. R. Co.*, *supra*, at 388.

"Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide the availability of the principle of *forum non conveniens* in these suits according to its own local law. To that end we vacate the judgment of the Supreme Court of Missouri and remand the cause to that Court for further proceedings not inconsistent with this opinion."

It is also illuminating to consider the concurring opinion of JACKSON, *J.*, who said at 340 U. S. p. 5:

"The Missouri Court appears to have acted under the supposed compulsion of *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, among other of this Court's decisions. The deciding vote in that case rested, in turn, only on what seemed to be compulsion of statutory provisions as to venue. By amendment, 28 U. S. C. §1404(a), as interpreted in *Ex parte Collett*, 337 U. S.

55, Congress has removed the compulsion which determined the *Miles* case, and the Missouri Court should no longer regard it as controlling. A federal court in Missouri would now be free to decline to hear this case and could transfer it to its proper forum. Certainly a State is under no obligation to provide a court for two nonresident parties to litigate a foreign-born cause of action when the Federal Government, which creates the cause of action, frees its own courts within that State from mandatory consideration of the same case. Because of what I wrote in the *Miles* case I add this note, but otherwise concur in the decision and opinion of the Court."

The effect of the decision in *Southern Railway Co. v. Mayfield* is to affirm the power of the Court below to have granted the motions, and to distinguish the *Kepner* and *Miles* cases (and necessarily the *Pope* case) from the present issues.

The holding of the Court below,—namely, that a state court does possess the power to dismiss Jones Act suits on the ground of *forum non conveniens*,—is supported by decisions in other states. Even prior to *Southern Railway Co. v. Mayfield*, it had been held that state courts could apply the doctrine of *forum non conveniens* so as to dismiss an F.E.L.A. action.

Walton v. Pryor, 276 Ill. 563, 115 N. E. 2 (S. Ct. 1917);

Marman v. Wabash Ry. Co., 246 N. Y. 244, 158 N. E. 508 (C. of A. 1927);

Mooney v. Denver & R. G. W. R. R. Co., 118 Utah 307, 221 Pac. 2d 628 (S. Ct. 1950), an encyclopedic and well reasoned opinion, written after the *Kepner* and *Miles* cases and before *Mayfield*, which correctly divined the law as later declared in *Mayfield*.

Since *Southern Railway Co. v. Mayfield*, and on the basis of that decision, state courts have recognized and exercised their power to apply their own doctrine of *forum non conveniens* to F.E.L.A. suits.

Price v. *Atchison, T. & S. F. Ry. Co.*, 42 Cal. 2d 577, 268 Pac. 2d 457 (S. Ct. 1954);
Atlantic Coast Line v. *Pope*, 93 Ga. App. 550, 92 S. E. 2d 300 (C. of A. 1956);
Peterie v. *Thompson*, 10 Ill. App. 2d 100, 134 N. E. 2d 534 (1956);
Johnson v. *C. B. & Q. R. R. Co.*, 243 Minn. 58, 66 N. W. 2d 763 (S. Ct. 1954);
Maynard v. *C. & N. W. Ry. Co.*, 247 Minn. 228, 77 N. W. 2d 183 (S. Ct. 1956);
St. Louis-S. F. Ry. Co. v. *Superior Court*, 276 Pac. 2d 773 (Okla. S. Ct. 1954), 290 Pac. 2d 118 (Okla. S. Ct. 1955).

Manifestly, the power of a state court to apply the doctrine of *forum non conveniens* in a Jones Act case is sanctioned by repeated decisions of this Court, and of state courts of last resort.

POINT II

The application of its doctrine of *forum non conveniens* by the New Jersey court presents no federal question.

Petitioners nowhere assert that the doctrine of *forum non conveniens*, as formulated and applied by the New Jersey courts, contravenes the Privileges and Immunities Clause or discriminates against Jones Act cases. From the decisions of this Court already quoted herein, it would seem that these were the only valid grounds of attack upon the judgment below, and these grounds have not been urged.

The authoritative exposition of the doctrine of *forum non conveniens* in New Jersey is found in *Gore* v. *U. S. Steel Corp.*, 15 N. J. 301, 104 Atl. 2d 670 (1954), cert. den. 348 U. S. 861 (1954). In formulating the doctrine, the New Jersey Supreme Court was careful to avoid transgressing the constitutional limitations, 15 N. J. at 311; 104 Atl. 2d at 675-676.

Petitioners' complaint seems to be primarily that the New Jersey court dismissed these actions even though, at the time they were instituted, personal service upon the defendants in Puerto Rico could not be had. However, the defendants herein agreed that, if the present actions were dismissed, they would voluntarily appear in actions brought by these plaintiffs in Puerto Rico on the same grounds; see 44 N. J. Super. at 539; 131 Atl. 2d at 40 (R. 2a). The judgments of dismissal were conditioned upon the defendants so doing; see 44 N. J. Super. at 552; 131 Atl. 2d at 48 (R. 17a).

Whether dismissal, on terms and conditions, may be made by a court in the only jurisdiction where *in personam* process can be obtained is not a federal question, but a matter of the applicable state doctrine of *forum non conveniens*. The New York courts have held that an action may be dismissed, under the doctrine of *forum non conveniens*, where the defendant agrees voluntarily to appear and litigate the case in a jurisdiction where he could not have been originally sued, *Rodrigue* v. *A. H. Bull S.S. Co.*, 286 App. Div. 804, 143 N. Y. S. 2d 618 (App. Div. 1955); *Ivy* v. *Stoddard*, 147 N. Y. S. 2d 469 (S. Ct. 1955). In the case at bar the New Jersey courts have adopted the same view; see 44 N. J. Super. at 543; 131 Atl. 2d at 42-43 (R. 6a to 7a).

Petitioners herein argue that the doctrine of *forum non conveniens* "presupposes at least two forums in which the

defendant is amenable to involuntary service of process," pages 2 and 4 of the petition for certiorari. Language to that effect was used in this court's opinion in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 at 507 (1947). But in the *Gilbert* case, this court was formulating the doctrine of *forum non conveniens* for application by the Federal courts. It was not laying down any principle of constitutional law or of the interpretation of any Federal statute, nor any other doctrine which was binding upon the courts of the several states. Language to this effect was not employed by the New Jersey Supreme Court in formulating the New Jersey doctrine of *forum non conveniens* in *Gore v. U. S. Steel Corp., supra*. On the contrary, in *Gore* the test was stated, not as the existence of "at least two forums in which the defendant is amenable to process", but rather as to whether "there is available another forum, where trial will best serve the convenience of the parties and the ends of justice," 15 N. J. at 305 and 311; 104 Atl. 2d at 672 and 676. In the cases at bar, the availability of another forum was presented by the offer of the defendants to appear personally in the Puerto Rico courts. This offer satisfies the requirements of the New Jersey doctrine of *forum non conveniens*. Therefore, no Federal question is presented.

Petitioners argue that "the defendants came into the New Jersey court with unclean hands" (pages 2 and 4; see also paragraph No. 5 on page 7 of petition for certiorari. This point is utterly without substance. "Unclean hands" applies only to a plaintiff in an equity proceeding, and not to a defendant in any proceeding.

Ciarl v. Watts, 10 N. J. Super. 283, 77 Atl. 2d 188 (Ch. Div. 1950);

Thomas v. Flanagan, 99 N. J. Eq. 198, 132 Atl. 305 (Ch. 1926).

CONCLUSION

In conclusion, therefore, respondents respectfully submit that the decisions below interpreted the jurisdictional requirements of the Jones Act in strict and faithful accord with the applicable decisions of this court; that no Federal question of substance is presented; and that the petition for certiorari should be denied.

Respectfully submitted,

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